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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

TAPESWITCH CORPORATION OF AMERICA,

Plaintiff-Respondent,

VS.

RECORA CO., INC.,

Defendant-Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

TAPESWITCH CORPORATION OF AMERICA,	)
	)
Plaintiff - Respondent	)
	)
-vs-	)
	)
RECORA CO., INC.,	)
	)
Defendant - Petitioner.	)

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

Your petitioner, RECORA CO., INC., prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals rendered in the above cause, as follows:

I. QUESTION PRESENTED FOR REVIEW

WHETHER DISMISSAL OF A SUIT BY A TRIAL COURT, WITHOUT A HEARING OR TRIAL, BECAUSE OF ALLEGED OR LATE COMPLIANCE WITH ORDERS REQUIRING A DISCOVERY DEPOSITION AND DELIVERY OF A PROPOSED PRETRIAL ORDER VIOLATES DUE PROCESS OF LAW STANDARDS, WHERE NO ADMONITION IS MADE BY THE TRIAL COURT, LESS SEVERE AND MORE APPROPRIATE SANCTIONS ARE AVAILABLE AND THE CONDUCT OF TRIAL COUNSEL IS EXCUSABLE AND NOT PREJUDICIAL TO THE ADVERSE PARTY?

II. PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of the case.

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IV. REFERENCE TO REPORTS OF OPINIONS

This case was brought in the United States District Court for the Northern District of Illinois, Eastern Division, and was before the United States Court of Appeals for the Seventh Circuit in three appeals. The trial court and the Court of Appeals entered the following opinions:

Date	Summary	Reported
June 23, 1975	Memorandum Opinion and Order, trial court, holding plaintiff's patent not infringed and invalid.	No
Feb. 26, 1976	Order, Court of Appeals, affirming and adopting June 23, 1975 trial court decision.	No
June 28, 1977	Memorandum Opinion and Order, trial court, granting summary judgment dismissing defendant's antitrust counterclaim.	at 196 USPQ 348
Jan. 12, 1979	Per Curiam Order,	No

	Court of Appeals, in part reversing June 28, 1977 trial court decision.	
Apr. 28, 1981	Order, trial court, granting plaintiff's motion to strike and dismiss counterclaim and dismiss action.	No
Apr. 29, 1981	Order, trial court, amending Apr. 28, 1981 order.	No
June 9, 1981	Order, trial court, denying defendant's motion to vacate order of Apr. 28, 1981, with Memorandum and Order appended.	
May 24, 1982	Order, Court of Appeals, affirming Apr. 28, 1981 trial court decision.	No
June 21, 1982	Order, Court of Appeals, denying petition for rehearing.	No

In addition to the above referred to opinions, the opinion of the Court of Appeals denying defendant's motion to dismiss the appeal from the June 23, 1975 decision is reported at 527 F.2d 1013, 189 USPQ 194.

All opinions referred to above which are not reported are reproduced in the Appendix to this Petition.

V. JURISDICTIONAL STATEMENT

A. JUDGMENT SOUGHT TO BE REVIEWED

The Court of Appeals rendered its Order sought to be reviewed in this proceeding, i.e. affirming the decision of the trial court granting plaintiff's motion to strike and dismiss defendant's counterclaim and to dismiss the action and denying defendant's motion to vacate that order, on May 24, 1982.

B. ORDER RESPECTING REHEARING

Defendant filed a timely Petition for Rehearing en banc, which was denied by the Court of Appeals on June 21, 1982.

C. STATUTORY PROVISION CONFERRING JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

VI. PROVISIONS OF RULES INVOLVED

The Rules involved in this case are F.R.C.P. Rules 6(d), 16, 37, and 41(b), the material portions of which are set out in the Appendix.

VII. STATEMENT OF THE CASE

Nature of the Case

This case arose as a patent infringement action by plaintiff-respondent Tapeswitch Corporation of America ("Tapeswitch") against defendant-petitioner Recora Co., Inc. ("Recora"), in which Recora defended that the patent was not infringed and was invalid and procured by fraud. Recora also filed its counterclaim for antitrust violations.

The patent infringement and fraud claims were tried separately, and the balance of the action was stayed. On trial, the patent was found invalid, not infringed and procured by

fraud, and the Court of Appeals affirmed that judgment, returning the case to the trial court for determination of the antitrust issues raised by Recora's counterclaim.

The antitrust issues of the counterclaim were initially disposed of by the trial court granting summary judgment dismissing the counterclaim, but on appeal the Court reversed as to Recora's 15 U.S.C. §§2 claims.

On April 28, 1981, Tapeswitch moved the trial court to strike the counterclaim and dismiss the action for failure to comply with discovery and court orders, and the trial court granted that motion, amending it on April 29, 1981 to dismiss the case. Recora moved to vacate the order and the trial court denied Recora's motion. The final order dismissing the cause was appealed to the Court of Appeals, which on May 24, 1982 affirmed the trial court. Recora filed a Petition for Rehearing en banc, which was

denied by the Court of Appeals on June 21, 1982.

The products involved in both the patent and antitrust phases of the case are electric switching mats and matting, which are concealed under carpets and when stepped on activate an alarm, used in security systems. Recora and Tapeswitch were competitors in the manufacture and sale of such products. Recora contends that Tapeswitch threatened it, its customers and prospects, with infringement of the fraudulent patent, in monopolizing and attempting to monopolize trade in undercarpet electric switch mats and matting for securing systems, and that Recora was injured as a result of Tapeswitch's acts.

Course of Proceedings Leading to Dismissal

The Court of Appeals returned its mandate requiring determination of the 15 U.S.C. §2 antitrust counterclaim on March 14, 1979. On May 1, 1979, Tapeswitch's attorneys Faber and Meilman withdrew and a Mr. Richenthal appeared

for Tapeswitch. On Sept. 7, 1979, the case was reassigned to the Hon. James B. Moran, who set it for trial March 10, 1980. On Feb. 22, 1980, Tapeswitch moved that trial be continued to May 12, 1980, citing the death of the wife of Tapeswitch's president and that a Mr. Valliere would be trying the case, as reasons for the continuance and the court struck the trial date, resetting it to May 19, 1980.

Tapeswitch served interrogatories and a request for production of documents March 28, 1980, and on April 28, 1980 again moved that the trial date be continued, based upon the death of Tapeswitch's president's wife and the new discovery request, and the trial court granted the motion, also setting the time for answering the interrogatories, which Recora answered May 16, 1980.

Tapeswitch served notice August 29, 1980 for the deposition of John A. Luckey, Recora's

president, on Sept. 5, 1980, two previous depositions of Luckey having been taken by Tapeswitch. On Sept. 5, 1980, Tapeswitch moved for an order compelling discovery based upon its dissatisfaction with Recora's answers to interrogatories filed May 16, 1980, and for an order compelling Luckey's deposition, and to strike the counterclaim and dismiss the action; and the court denied the motions, with directions that Luckey "appear for a concluding deposition at a reasonable time, after being advised of the areas to be covered", and extended discovery to Nov. 11, 1980.

Tapeswitch moved to extend discovery to Feb. 12, 1981 on the ground its attorney would be out of the country, and the motion was granted. On Feb. 26, 1981, Tapeswitch moved again for an order striking the counterclaim and dismissing the action, which was continued generally, and the trial court also directed Recora to tender a

proposed pretrial order by March 13, 1981 and that the parties file a final pretrial order by March 25, 1981, setting a pretrial conference for March 25, 1981 and trial for Apr. 6, 1981.

The deposition of Luckey was taken by Tapeswitch March 16, 1981. On March 25, 1981, Tapeswitch served on Recora's attorney Ambrose notice of motion to strike and dismiss the counterclaim for failure to comply with discovery and court orders, which was taken under advisement. At that time the trial court directed Recora to serve a pretrial order draft on Tapeswitch and comply with outstanding discovery by April 20, 1981, continuing the pretrial conference to April 29, 1981 and striking the April 6, 1981 trial date.

No record exists as to what occurred at the March 25, 1981 chambers conference. In its June 9, 1981 denial of Recora's motion to vacate the April 28, 1981 order of dismissal, the trial judge said "This court, recognizing that compelling

Recora to comply prior to the April 6 trial date might well prejudice Tapeswitch in its preparation for trial and would require cancelation of long established personal plans (of Mr. Valliere), reluctantly cancelled the trial date." Ambrose said that at the March 25, 1981 conference "The Court did not fix a date to deliver a final pretrial order or state that the case would be dismissed if said pretrial order was not delivered to Mr. Valliere."

According to Ambrose, after the March 25, 1981 pretrial conference he attempted to contact Valliere, but was told Valliere was out of town. Valliere's office said they would have him contact Ambrose on his return, but he never did. Ambrose statedhe never received any response from Valliere as to preparation of a Pretrial order nor was any motion filed for sanctions for failure to complete discovery.

Ambrose's father became seriously ill and passed away April 21, 1981. Prior thereto Ambrose spent much of his time assisting his father and

thereafter Ambrose made all arrangements for his father's funeral, held April 24, 1981.

On Monday, April 27, 1981, at 4:30 PM, Tapeswitch served notice on Ambrose of its motion for sanctions for failure to comply with the court order requiring Recora to deliver a pretrial order draft by April 20, 1981, setting the motion for hearing on Tuesday morning, April 28, 1981. At the hearing April 28, 1981, the trial court summarily dismissed the counterclaim, amending the order on April 29, 1981 to dismiss the cause.

On May 13, 1981, Recora lodged with the court a final pretrial order draft, and on May 14, 1981 moved to vacate the order of dismissal, requesting an evidentiary hearing on the issues. At the hearing of May 14, 1981, the Court decided to take the motion on briefs under local Rules, and Recora filed affidavits in support of its motion.

It was established that Ambrose never received

a copy of the March 25, 1981 order setting the April 20, 1981 deadline for delivery of the pretrial order draft, because his name and address was not entered on the District Court docket. Recorda's other attorney, Faier, was out of Chicago and unaware of proceedings in this case in February, March and part of April, 1981 and did not know of the existence of the April 20, 1981 requirement until after dismissal, nor was Tapeswitch's motion to dismiss served upon him.

On June 9, 1981, the trial court denied the motion to vacate the order of dismissal.

Other Historical Facts

The parties have litigated more than eight years. The case has thrice been before the Court of Appeals; part of the case has been fully tried and adjudicated. Ten depositions were taken. Eight sets of interrogatories have been asked and answered. Requests for Admissions have been made and responded to. Each side produced hundreds of pages of documents

responsive to requests for production. There have been no discovery disputes in the case other than those set out in the preceding section leading to dismissal. Every deposition noticed was taken.

After the court first set a trial date on the antitrust counterclaim, when the case was already about seven years old, only Tapeswitch made motions to reset trial dates and to extend discovery, after discovery had been closed, reopened and closed again. No such accommodation was made for Recora, even the week after the death of its attorney's father. No setting of a trial date or date for presenting the pretrial order to the court was in existence when the trial court imposed the sanction of dismissal for which review is now sought.

VIII. FEDERAL JURSIDICTION IN THE FIRST INSTANCE

This cause was initiated as a patent infringement case under 35 U.S.C. 281, and the counterclaim

alleged violations of 15 U.S.C. 2. Original jurisdiction in the United States District Court was founded in 28 U.S.C. 1337 and 1338.

IX. ARGUMENT

A. The motion to dismiss should not have been granted because it was improvidently brought and has insufficient basis in law or fact.

F.R.C.P. 6(d) requires five days notice for hearing. The notice here was served at 4:30 PM of the day before hearing. Recora was given no time to respond. The death of Ambrose's father six days before hearing and his funeral three days before hearing, with no other representative of Recora served or with notice of the proceeding, prevented or at least substantially inhibited any meaningful response. The unavailability of both attorneys in the time required to comply with the April 20, 1981 pretrial order draft date, and the lack of knowledge of that requirement prevented a fair disposition of the motion. Such a summary disposition of the case by the

trial court was unfair.

Even if the notice had been timely and Recora was able to make an effective response, the basis of the motion was without substance.

(1) Discovery

Failure to make discovery is governed by F.R.C.P. 37. Tapeswitch apparently raised two issues in support of its motion: (i) that Recora failed to suitably answer the interrogatories filed March 28, 1980, and (ii) that Recora failed to present Lucky for his third deposition. However, the interrogatories were answered in full May 16, 1980, and when Tapeswitch was first heard to object to them four months later, the trial court, on Sept. 5, 1980 denied Tapeswitch's motion to compell. As to the Luckey deposition, on Sept. 8, 1980, the court required Luckey "to appear for a concluding deposition at a reasonable time after being advised of the areas to be covered" and Luckey's deposition, after controversy dealing with it was resolved, was in fact taken March 16, 1981.

The record reflects no order compelling any other discovery.

Sanctions may not be imposed without an underlying order compelling discovery under Rule 37, Fisher v. United States Fidelity & Guaranty Co., CA7 1957, 246 F.2d 344, and even then sanctions should not be imposed if there is a good faith effort of compliance, Societe International etc. v. Rogers, 1958, 357 U.S. 197. In the present case, there was no underlying order compelling discovery, and the long history of the case evidences good faith compliance with discovery rules.

Moreover, sanctions imposed here were more severe than justified under F.R.C.P. 37(d) and were not required to protect Tapeswitch.

"Preclusionary orders insure that a party will not be able to profit from his own failure to comply. Dellums v. Powell, 566 F.2d 231 (1977). Rule 37 strictures are also specific deterrents, and, like civil contempt, they seek to secure compliance with the particular order at hand. Robinson v. Transamerican Insurance Co., 368 F.2d 37.

Finally, although the most drastic sanctions may not be imposed as "mere penalties", Hammond Packaging Co. v. Arkansas, 212 U.S. 222; Hovey v. Elliott, 167 U.S. 409, courts are free to consider the generaly deterrent effect their order may have on the instant case and on other litigations, provided that the party on whom they are imposed is in some sense at fault. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639; Societe Internationale etc. v. Rogers, 357 U.S. 197."

See Cine 42nd Street Theatre Corp. v. Allied Artists Pictures Corp. 602 F.2d 1062.

Where a general deterioration of a pretrial process cannot be attributed solely to plaintiffs, "it is an abuse of discretion to have tried to cure abuse on both sides by denying plaintiff all opportunity for relief." Eggleston et al v. Chicago Journeymen Plumbers' Local Union No. 130, U.A. et al etc., CA7 1981, F.2d

(2) Pretrial Order

Recora was also penalized because it failed to timely deliver to its adversary a pretrial order draft. How could a meaningful pretrial order draft be prepared without the transcript

of the Luckey deposition, which was claimed to be important by Tapeswitch? Even without that transcript, and even assuming Recora's attorney knew about the pretrial order draft delivery requirement, and even ignoring the last illness and death of his father, the failure to make the delivery should not have justified the strict and severe sanction imposed, particularly since the draft was in fact delivered two weeks late when the court's requirement was known and the other personal problems of the attorneys were not so burdensome.

Pretrial procedures are governed by F.R.C.P. 16. The Rule places responsibility of making the order on the trial judge. Where the trial court knew the case had unresolved pretrial issues, because the trial date had been stricken, there were no pretrial pressures justifying the imposition of strict and severe sanctions.

In Gamble v. Pope & Talbot, Inc., ED Pa. 1961,

191 F.Supp. 763, 4 FR Serv. 2d 16.13, Case 1, a pretrial memorandum was not filed until one day before pretrial conference, ten months after it was due, but three months prior to trial, and the court refused to dismiss the case, but imposed a fine on counsel; and the Court of Appeals, 307 F.2d 729, CA 3 1962, 6 FR Serv. 2d 16.44, Case 1, even reversed that sanction, holding there was no prejudice to the adversary.

Under Rule 16, Rule 37(d) sanctions may be imposed, but they must be judiciously applied under similar standards, as Rule 16 confers no power of dismissal not otherwise in the Rules, Syracuse Broadcasting Corp. v. Newhouse, CA2 1959, 271 F.2d 910. Such sanctions must be appropriate to the offense, Matheny v. Porter, CA 10 1946, 158 F.2d 478.

"Where it has been established that failure to comply...has been due to inability and not to wilfulness, bad faith or any fault of the disobedient party...the harshest sanction of dismissal is improper." Societe International etc. v. Rogers, 1958, 357 U.S. 197.

"The draconian remedy of dismissal" is suitable only in extreme circumstances, Marshall v. Segona, 621 F.2d 763 (1980). A standard of reasonable appropriateness of the sanction applied is applicable to Rule 41(b) dismissals and the court in exercising its discretion must consider reasonable excuses, Equal Employment Opportunity Comm'n v. American Auto. Ass'n, SD Fla. 1975, 21 FR Serv. 2d 999.

Where at best the fault lies with a party's counsel, and not with the party, such as is the case with preparation and delivery of a pretrial order draft, dismissal is a harsh sanction, and a lesser sanction directed to an offending attorney or setting up a condition to be met on threat of dismissal, would be more justified, Graves v. Kaiser Aluminum & Chemical Co., CA5 1976, 528 F.2d 1360. As Mr. Justice Black dealt with the problem in his dissent in Link v. Wabash Railroad Co., 370 U.S. 626, 1976, joined by two other justices where only seven members of the court participated, the sins of the lawyer ought not be visited upon

his client where sanctions are considered.

In Butler v. Pearson, 636 F.2d 529, CA DC 1980, Judge Swygert said, at page 531:

> ..."In no way do we condone counsel's failure to file timely responses, or at least to notify the court of the difficulties he was having... But the c ncept of proportionality demand that plaintiffs not be unfairly penalized for negligence of their attorney. In these circumstances, we are persuaded that the drastic remedy of dismissal was disproportionate to the level of negligence shown. We thus conclude that the district court abused his discretion when he denied plaintiff's motion to vacate the dismissal and reinstate the case."

Also see McGowen v. Faulkner Concrete Pipe Co., 32 FR Serv. 2d 968, CA 5 1981, and Foley v. United States, CA 2 1981, 645 F.2d 155, 157.

B. Standards of discretion for imposing sanctions on a party for failure to comply with pretrial orders, particularly where the root cause is an act of its attorney, ought to be clearly defined and must be equally applied for the fair administration of justice.

The thrust of the Model Rules for Case Management discussed in the Wayne D. Brazil American Bar Foundation Research Journal article Improving Judicial Controls over the Pretrial

Development of Civil Actions: Model Rules for Case Management and Sanctions, Fall, 1981, pages 873-965, is that discovery procedures and management require reform, and the present provisions and administration of the Federal Rules are inadequate for accomplishing that reform. The model rules ought to expressly deal with sanctions, see pages 954-955, which fix the failure to satisfy discovery obligations by a preponderance of evidence, which leaves no meaningful room for doubt that the failure was not the product of bad faith or improper purposes or beyond a party's or attorney's control. The model rules suggest that upon such a finding, the court ought to impose sanctions of "payment of just compensation" before considering the appropriateness of other sanctions. If such a rule or suggestion by this Court were in existence at the time of the happening of the acts or omissions giving rise to the case at bar, this case and many of the other cases dealing with the sanction issue would not require the time of judicial administration.

This court, as recently as 1980 in Roadway Express, Inc. v. Piper et al, 447 U.S. 752, recognizing the need for sanctions for failure to comply with discovery orders, has suggested the availability of awards of expenses "to penalize those whose conduct may be deemed to warrant such a sanction, (and) to deter those who might be tempted to such conduct in the absence of such a deterrent" (quoting the National Hockey League case, 427 U.S. 636 (1976), at 643), see pages 763-764. Three justices of this Court, with a wide divurgence of views, Mr. Justice Powell, Mr. Justice Stewart and Mr. Justice Rehnquist, in ACF Industries, Inc. et al v. Equal Employment Opportunity Comm'n, 439 U.S. 1081 (1979), joined in dissent to the denial of a petition for certiorari, where the trial court had granted sanctions confessing issues in favor of a party, excluding evidence, and ordering payment of attorney's fees, in lieu of granting a motion to dismiss, and the Court

of Appeals reversed the decision of the trial court. The Justices view such denial as inconsistent with the National Hockey League case(427 U.S. 639, 642), holding the principles vital to "the proper functioning of the federal courts" (see pg. 1081). While the dissenting justices recognized that "there is a pressing need for judicial supervision in this area" (see pg. 1087), they also suggested that rule changes should be made.

As the note writer in Temple Law Quarterly: Civil Procedure: Discovery Sanctions, Vol. 53 1980, pages 140-152, comments, concerning the Cine case, 602 F.2d 1962, supra,"it appears the Cine court, in its zeal to promote efficiency and deter other litigants from similar course of conduct, may have overstepped the limits of due process by imposing a sanction out of proportion to the wrong" (see page 152).

Your petitioner submits that the rule ought to impose the obligation on the trial court

as a condition for granting sanctions that flagrant bad faith and callous disregard for discovery obligations must be found before imposing sanctions, and that only such sanctions as are required or justified to force compliance on the party or attorney in default be ordered, but the sanction of dismissal should be used only in the most flagrant case against a party when he has abused the discovery process.

As Judge J. Skelly Wright said, in Black Panther Party v. Smith, 32 FR Serv. 2d 1, CA DC 1981, at pages 13-14:

> "Even where the underlying discovery order is valid, district courts should exercise their discretion to impose the extreme sanction of dismissal...only when a party has displayed callous disregard for its discovery obligations...or...has exhibited extreme bad faith. ...If less drastic sanctions will be equally effective, they should be employed; dismissal should be used as a last resort..."
>
> "In the absence of a valid underlying discovery order, however, or where the litigant on whom the sanction will be imposed has not displayed unusual intrans-

igence, dismissal is not proper. The deterence goal, by itself, will not support such a harsh result."

C. The Court of Appeals, in affirming the trial court accepted as proven facts assertions of the trial judge which were not supported by the record, and went beyond those pronouncements to find additional facts not contemplated by the trial court.

Trial judge Moran's Memorandum and Order dated June 9, 1981 was based upon recollection of events occuring in February and March, 1981, without benefit of transcripts. There was no reporter's transcript of the March 25, 1981 chamber conference, where the order leading to the present dispute arose, but the Court of Appeals accepts the trial judge's version as findings of fact

A transcript for the Feb. 26, 1981 hearing was before the Court of Appeals and it is not consistent with Judge Moran's June 9, 1981 recollection, a fact ignored by the Court of Appeals.

Recora sought an evidentiary hearing below, but the trial judge decided to take the motion to

vacate the dismissal order on briefs, even though the motion contained matters at variance with the trial court's eventual June 9, 1981 findings.

The Court of Appeals found facts on its own well beyond the statements expressed by the trial court in its June 9, 1981 Memorandum and Order. For example, the Court of Appeals found "Recora should suffer from its lawyer's negligence", yet no finding of negligence was ever suggested by Judge Moran. The Court of Appeals found "Recora's bad faith", but Judge Moran made no such finding. These findings, without basis in the record, and not contemplated as "facts" by the trial court, should play no part in resolving the present issue.

D. Conclusion

For the reasons set out above, petitioner respectfully submits that this Petition for Writ of Certiorari should be granted and the decision of the Court of Appeals for the Seventh Circuit

should be reviewed.

Respectfully submitted,

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APPENDIX TO THE

PETITION FOR WRIT OF CERTIORARI

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